Supreme Court, U.S.
FILED
JUL 31 2007
OFFICE OF THE CLERK

No. 07-137

In The
Supreme Court of the United States

THOMAS H. BARANOWSKI,

Petitioner,

v.

LARRY HART, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

JOEL L. THOLLANDER
Counsel of Record
MCKOOL SMITH, P.C.
300 W. 6th Street, Suite 1700
Austin, Texas 78701
(512) 692-8700
(512) 692-8744 (FAX)

ANTHONY GARZA
MCKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, Texas 75201
(214) 978-4000
(214) 978-4044 (FAX)

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a regulation that forces an inmate to forfeit his regular Sabbath group worship if he cannot secure the presence of a Rabbi or prison-approved outside volunteer constitutes a "substantial burden" under the Religious Land Use and Institutionalized Persons Act.

PARTIES TO THE PROCEEDINGS

The petitioner in this Court is Thomas H. Baranowski.

The respondents are Larry Hart, Unit Chaplain, Huntsville Unit, Texas Department of Criminal Justice; Bill Pierce, Director of Chaplaincy Department, Texas Department of Criminal Justice; Lawrence Hodges, Warden, Huntsville Unit, Texas Department of Criminal Justice; and Douglas Dretke, Director of the Correctional Institutions Division, Texas Department of Criminal Justice.

TABLE OF CONTENTS

	Page
Brief for Petitioner	1
Opinions Below	1
Jurisdiction	1
Applicable Statutory Provision	1
Statement	2
Reasons for Granting the Writ	5
A. The Fifth Circuit's Application of the RLUIPA "Substantial Burden" Standard Is Inconsistent With the Approach of Other Circuits	5
B. The Decision in the Court Below Conflicts With Supreme Court Doctrine	10
C. The Decision Ignores Distinctions Between Prisoner and Land-Use Cases	12
Conclusion	14

TABLE OF AUTHORITIES

Page

CASES

Adkins v. Kaspar, 393 F.3d 559 (5th Cir. 2004) ..... *passim*

Agrawal v. Briley, No. 02-CV-6807, 2004 U.S. Dist. LEXIS 16997 (N.D. Ill. Aug. 25, 2004) 10, 11, 13, 14

Baranowski v. Hart, 486 F.3d 112 (5th Cir. 2007) .... *passim*

Baranowski v. Hart, No. 4:03-CV-03893, 2005 U.S. Dist. LEXIS 36231 (S.D. Tex. July 15, 2005) 1

Charles v. Verhagen, 220 F. Supp. 2d 937 (W.D. Wis. 2002) 9, 14

Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003) 3, 11

Coronel v. Paul, 316 F. Supp. 2d 868 (D. Ariz. 2004) 14

Cutter v. Wilkinson, 544 U.S. 709 (2005) 12

Episcopal Student Foundation v. Ann Arbor, 341 F. Supp. 2d 691 (E.D. Mich. 2004) 11, 12

Farrow v. Stanley, No. 02-CV-567-B, 2004 U.S. Dist. LEXIS 1518 (D.N.H. Feb. 5, 2004) 9, 10, 14

Henderson v. Kennedy, 253 F.3d 12 (D.C. Cir. 2001) 12

Lovelace v. Lee, 472 F.3d 174 (4th Cir. 2006) 2, 6, 8

Lyng v. N.W. Indian Cemetery Protective Assoc., 485 U.S. 439 (1988) 12

Mack v. O'Leary, 80 F.3d 1175 (7th Cir. 1996) 14

Marria v. Broaddus, No. 97-CV-8297-NRB, 2003 U.S. Dist. LEXIS 13329 (S.D.N.Y. July 31, 2003) ... 10, 14

Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214 (11th Cir. 2004) 3, 6, 9, 12

TABLE OF AUTHORITIES – Continued

Page

Murphy v. Mo. Dep't of Corrs., 372 F.3d 979 (8th Cir. 2004) 6

San Jose Christian College v. City of Morgan Hill, 360 F.3d 1024 (9th Cir. 2004) 6, 9, 12

Shakur v. Selsky, 391 F.3d 106 (2d Cir. 2004) 9

Sherbert v. Verner, 374 U.S. 398 (1963) 3, 10, 11

Spratt v. R.I. Dep't of Corrs., 482 F.3d 33 (1st Cir. 2007) 3, 6, 8

Thomas v. Review Board, 450 U.S. 707 (1981) 3, 6, 10, 11

Warsoldier v. Woodford, 418 F.3d 989 (9th Cir. 2005) 11

Werner v. McCotter, 49 F.3d 1476 (10th Cir. 1995) 14

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 2000cc-1 (Religious Land Use and Institutionalized Persons Act) 1, 2

OTHER AUTHORITY

Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 Harv. J.L. & Pub. Pol'y 501 (2005) 14, 15

BRIEF FOR PETITIONER

Petitioner inmate respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 486 F.3d 112 (5th Cir. 2007), and is reproduced in the Appendix at App. A. The opinion of the district court is reported at 2005 U.S. Dist. LEXIS 36231 (S.D. Tex. July 15, 2005), and is reproduced in the Appendix at App. B.

JURISDICTION

The court of appeals entered its judgment on May 4, 2007. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

APPLICABLE STATUTORY PROVISION

The portion of the Religious Land Use and Institutionalized Persons Act relevant to this petition is 42 U.S.C. § 2000cc-1(a):

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person –

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

STATEMENT

Petitioner Thomas H. Baranowski seeks review of the Fifth Circuit's interpretation of the term "substantial burden" as used in the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1(a). The panel held, incorrectly, that the Texas Department of Criminal Justice ("TDCJ") regulation which forced Baranowski to forfeit his regular Sabbath group worship did not constitute a "substantial burden" on Baranowski's religious exercise.

In reaching its holding, the panel did not examine the particularized effect of the TDCJ regulation on Baranowski's religious exercise. Instead, the panel relied on a prior Fifth Circuit case, *Adkins v. Kaspar*, which also refused to engage in an adherent-based analysis in determining whether the burden placed on a prisoner's religious exercise by the TDCJ regulation at issue was substantial. 393 F.3d 559, 570 (5th Cir. 2004), *cert. denied*, 545 U.S. 1104 (2005).[1] This approach differs from that of other circuits, and circumvents the wording and intent of the statute. *See Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir.

[1] The panel noted that the facts in *Baranowski* are not materially different from those in *Adkins*. *See Baranowski v. Hart*, 486 F.3d 112, 121 (5th Cir. 2007) ("We reach the same result in the instant case . . . on facts that are not materially different from *Adkins*.").

2006); *[illegible]tt v. R.I. Dep't of Corrs.*, 482 F.3d 33, 38 (1st Cir. 2007); *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214, 1227-28 (11th Cir. 2004).

The court of appeals buttressed its conclusion by suggesting that any burden to Baranowski's religious exercise was caused most directly by a "dearth of clergy and authorized volunteers," and only indirectly by the prison regulation which required the presence of such volunteers. Although this "direct/indirect" analysis arguably comports with that of another circuit, it conflicts with this Court's doctrine. *Compare Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003), *cert. denied*, 541 U.S. 1096 (2004); *with Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Thomas v. Review Board*, 450 U.S. 707, 718-19 (1981).

Petitioner Thomas H. Baranowski is a practicing Jewish prisoner confined by the TDCJ. App. B at 24. Baranowski, like other observant followers of Judaism, is obligated to attend congregational services every Friday evening. TDCJ prison regulations require the presence and direct supervision of either the unit Chaplain or an "approved religious volunteer" for any meetings of a religious nature, including these Sabbath congregational services. App. B at 32. On September 5 and 12, 2003, as well as October 3 and 10, 2003, Baranowski's unit did not sponsor any Jewish Sabbath services because a Rabbi or qualified volunteer was not available. App. B at 32. Baranowski claims, *inter alia*, that his inability to assemble on every Sabbath and every Jewish holy day "substantially burdens" the practice of his religion, in violation of RLUIPA.

On July 15, 2005, the United States District Court for the Southern District of Texas held that the Defendants had not substantially burdened Baranowski's religious exercise, noting that "on the days [Baranowski] claims no Friday evening services were provided, no rabbi or approved religious volunteer was available to lead the services. [Baranowski] does not submit any summary judgment evidence that defendants turned away an available rabbi or approved religious volunteer for those services." App. B at 38. The district court cited *Adkins* for support, noting that government action does not create a substantial burden on religious expression if it "merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed." App. B at 38 (citing *Adkins*, 393 F.3d at 570).

The Fifth Circuit affirmed the district court, and found that the TDCJ regulation that precluded Baranowski from engaging in group worship on the Sabbath did not place a substantial burden on his religious exercise. Like the district court, the Fifth Circuit panel relied on *Adkins* for support. *Baranowski*, 486 F.3d at 124-25. The Fifth Circuit has now twice held that the requirement of an outside volunteer for all religious assemblies does not place a substantial burden on the religious exercise of inmates, whether or not that requirement effectively results, under the particular circumstances at issue, in a complete ban on group worship.

REASONS FOR GRANTING THE WRIT

A. The Fifth Circuit's Application of the RLUIPA "Substantial Burden" Standard Is Inconsistent With the Approach of Other Circuits.

The Fifth Circuit's application of the "substantial burden" standard in *Baranowski* and *Adkins* is inconsistent with the approach taken in other circuits – in both Fifth Circuit cases, the analysis did not turn on the actual, particularized effect of the government regulation on the adherent. In *Adkins*, the court conceded that Adkins was prevented from congregating on many holy days. 393 F.3d at 571. The panel nevertheless concluded that the prerequisite mandated by the prison – the attendance of an outside volunteer – did not place a substantial burden on Adkins's religious exercise. *Id.* Significantly, it reached this conclusion without considering whether Adkins could actually find an outside volunteer for every holy day or Sabbath. *Id.* The court considered the same TDCJ regulation in *Baranowski*, and again, without considering whether Baranowski could find an outside volunteer for each Sabbath and holy day, found no substantial burden on his religious exercise. 486 F.3d at 124-25.

A close review of *Adkins* explains the results in both cases. On the surface, the legal test enunciated in *Adkins*, and quoted in *Baranowski*, is not worlds away from the tests used in some other circuits – "a government action or regulation creates a 'substantial burden' if it truly pressures the adherent to significantly modify his religious

behavior and significantly violates his religious beliefs." 393 F.3d at 570.[2] However, the *Adkins* panel continued:

> And, in line with the foregoing teachings of the Supreme Court, the effect of a government action or regulation is significant when it either (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs. **On the opposite end of the spectrum, however, a government action or regulation**

---

[2] It is significant, however, that the six circuits to address the issue have propounded differing definitions for "substantial burden" under RLUIPA. In *Midrash Sephardi*, the Eleventh Circuit held that "an individual's exercise of religion is 'substantially burdened' if a regulation completely prevents the individual from engaging in religiously mandated activity, or if the regulation requires participation in an activity prohibited by religion." 366 F.3d at 1227. The Ninth Circuit, in *San Jose Christian College*, held that a substantial burden results from the imposition of a "significantly great restriction or onus on any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034-35 (9th Cir. 2004). In *Murphy*, the Eighth Circuit defined substantial burden to include regulations that "significantly inhibit or constrain conduct or expression that manifests some central tenet of a person's individual religious beliefs," "meaningfully curtail a person's ability to express adherence to his or her faith," or "deny a person reasonable opportunities to engage in those activities that are fundamental to a person's religion." *Murphy v. Mo. Dep't of Corrs.*, 372 F.3d 979, 988 (8th Cir. 2004). In *Lovelace*, the Fourth Circuit held that a substantial burden "occurs when a state or local government, through act or omission, 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs.'" 472 F.3d at 187 (quoting *Thomas*, 450 U.S. at 718). The First Circuit, in *Spratt*, adopted the *Lovelace* test. *Spratt*, 482 F.3d at 38. These varying definitions further demonstrate the need for this Court's guidance and clarification on the correct standard for determining whether a burden is "substantial" under RLUIPA.

> **does not rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed.**

Id. (emphasis added).[3] The panel in *Adkins* focused on the equal application of the regulation, rather than the particularized effect of the regulation on the adherent, in determining that no substantial burden existed.[4] Thus, because unsupervised group worship was not "generally available," the restriction of such worship did not constitute a "substantial burden" under RLUIPA. *Id.* at 571.

The *Baranowski* panel also held that the regulation at issue did not constitute a substantial burden without determining the particularized effect of requiring an outside volunteer on Baranowski's ability to participate in group Sabbath worship. 486 F.3d at 124-25. For example, the panel did not analyze the burden of foregoing group Sabbath worship in light of Baranowski's individualized religious beliefs, nor did it recognize the particular difficulty of finding willing outside volunteers – which may be

---

[3] As noted earlier, the *Baranowski* district court relied on this section of *Adkins* in determining that Baranowski had not shown a substantial burden. *See* App. B at 38.

[4] *See id.* at 571 ("With the exception of Muslims who are subject to a special court order, every religious group at [the prison] is required to have a qualified outside volunteer on such occasions. . . . The requirement of an outside volunteer . . . is a uniform requirement for all religious assemblies at [the prison] with the exception of Muslims. . . . We admit some lingering concern about the prison authorities' refusal to [allow a certain couple to act as volunteers] . . . which in turn prevents YEA members from congregating on the same basis as other similarly situated groups.").

significant, considering that such volunteers who are practicing Orthodox Jews cannot travel from sundown Friday to sundown Saturday, and thus must stay in the prison (or within walking distance) to participate in Sabbath worship. Instead, the panel noted that it considered a similar regulation in *Adkins*, and applied its holding, without considering any particularized differences in Baranowski's and Adkins's situations. Under the *Baranowski* and *Adkins* analysis, then, the nature of the regulation is the deciding factor, not the effect of the regulation on the adherent's religious exercise.

In contrast, other circuits consider the actual, particularized effects on the adherent in determining whether a prison regulation creates a substantial burden on the adherent's religious exercise. For example, in *Lovelace*, the Fourth Circuit first considered the particular religious beliefs of the affected inmate, and then determined that the prison policy at issue actually restricted his religious exercise, as it prevented him from fasting during daylight hours or participating in organized religious services. *See* 472 F.3d at 187 ("[The dissent] overlooks the fact that the policy works to restrict the religious exercise of any [Nation of Islam] inmate who cannot or does not fast, but who still wishes to participate in group services or prayers.") In *Spratt*, an inmate desired to preach to his fellow inmates. 482 F.3d at 35, 38. The First Circuit recognized a substantial burden when, due to a generally-applicable prison regulation, he was not allowed to preach "anytime or anywhere." *Id.* Similarly, in deciding whether the relocation of a synagogue imposed a substantial burden, the Eleventh Circuit recognized the actual, particularized effect on observant Jews who may not drive on the Sabbath – they would have to walk farther to travel to the

synagogue. *Midrash Sephardi*, 366 F.3d at 1227-28. The circuit court found the burden "of walking a few extra blocks" to the synagogue insubstantial, *id.*, but it is unlikely that it would also have found the burden insubstantial if it meant an outright forfeiture of the right to congregate on the Sabbath.

In its application of *Adkins*, the court of appeals fundamentally misapplied RLUIPA by ignoring the ordinary or natural meaning of "burden" – "something that is oppressive." *See Midrash Sephardi*, 366 F.3d at 1226 ("Because RLUIPA does not define 'substantial burden,' we give the term its ordinary or natural meaning."); *San Jose Christian College*, 360 F.3d at 1034 (9th Cir. 2004) (quoting Black's Law Dictionary to define "burden"). The *Adkins* panel did not determine whether a regulation was oppressive to the adherent. Rather, the analysis in that case turned on whether the regulation prevented the adherent from participating in religious exercise that is not "generally allowed." This is in substantial conflict with the many cases recognizing a prison regulation as oppressive to religious exercise despite the fact that the exercise in question would not be "generally allowed." *See Shakur v. Selsky*, 391 F.3d 106, 120 (2d Cir. 2004);[5] *Charles v. Verhagen*, 220 F. Supp. 2d 937, 946 (W.D. Wis. 2002);[6] *Farrow v. Stanley*, No. 02-CV-567-B, 2004 U.S. Dist.

---

[5] Plaintiff requested permission to attend the Eid ul Fitr feast, a Muslim holiday. *Id.* at 108.

[6] Plaintiff requested two communal meals: one to celebrate the end of Ramadan and one to celebrate the end of the Hajj. *Id.* Prison regulations limited religious feasts to one each year. *Id.*

LEXIS 1518, at *29-30 (D.N.H. Feb. 5, 2004);[7] *Marria v. Broaddus*, No. 97-CV-8297-NRB, 2003 U.S. Dist. LEXIS 13329, at *48 (S.D.N.Y. July 31, 2003);[8] *Agrawal v. Briley*, No. 02-CV-6807, 2004 U.S. Dist. LEXIS 16997, at *22 (N.D. Ill. Aug. 25, 2004).[9] *Baranowski* shows that *Adkins* was not a one-off situation; the circuit continues to ignore the fundamental nature of burdens by applying *Adkins* to RLUIPA challenges, and by failing to consider the challenged regulation's actual particularized effect on the adherent's religious exercise. This interpretation and application of the RLUIPA standard demands correction.

B. The Decision in the Court Below Conflicts With Supreme Court Doctrine.

In past cases, this Court has not shown special protection for government action that "indirectly" burdens religion. In *Sherbert v. Verner*, this Court held that an indirect burden may be constitutionally suspect. 374 U.S. 398, 404 (1963); *see also id.* (noting further that the "placing of conditions upon a benefit or privilege" can infringe religious liberty). In *Thomas*, the Court held that indirect compulsion may substantially impinge free exercise rights. 450 U.S. at 718-19; *accord*

---

[7] Plaintiff requested access to a "sweat lodge," a place of healing used to cleanse the body and renew the spirit integral to Native religions. *Id.* at *5.

[8] Plaintiff requested access to the Supreme Mathematics and the Supreme Alphabet – both numerology devices associated with the Nation of Gods and Earths. *Id.* at *9.

[9] Plaintiff requested a nutritious diet free of meat and eggs as required by the Vaishnava Hindu religion. *Id.* at *2.

Warsoldier v. Woodford, 418 F.3d 989, 995 (9th Cir. 2005) (applying *Thomas* to an RLUIPA claim).

Despite this, the court of appeals justified its decision, at least in part, by reference to the "indirect" nature of the religious burden. *See Baranowski*, 486 F.3d at 125. ("We explained [in *Adkins*] that the plaintiff and other YEA members were not prevented from congregating by prison policy but by the dearth of clergy and authorized volunteers."); *Adkins*, 393 F.3d at 571; *cf. Civil Liberties for Urban Believers v. Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) ("[A] land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rending religious exercise . . . effectively impracticable."). Under this interpretation, indirect burdens are somehow less "substantial" than direct burdens.

The direct/indirect distinction is neither legitimate nor helpful. Indirect regulations can substantially burden religion. *See Agrawal*, 2004 U.S. Dist. LEXIS 16997, at *20-22 (finding that a regulation that conditioned a religious diet on written verification by a clergy member was a substantial burden under RLUIPA). Direct regulations may not substantially burden religion. *See Episcopal Student Found. v. Ann Arbor*, 341 F. Supp. 2d 691, 703-07 (E.D. Mich. 2004) (finding a denial of an application to demolish its existing church did not constitute a substantial burden). Because the Fifth Circuit relies on a distinction that this Court has already ruled inapposite in analogous religion cases, this petition should be granted, and that approach be corrected. *See Sherbert*, 374 U.S. at 404; *Thomas*, 450 U.S. at 718-19.

C. The Decision Ignores Distinctions Between Prisoner and Land-Use Cases.

The Fifth Circuit's approach also improperly imports principles relevant to land-use cases into its analysis of RLUIPA claims brought by prisoners such as Baranowski. In land-use cases, the adherent usually has an element of control. *See, e.g., Episcopal Student Found.*, 341 F. Supp. 2d at 704 (finding no "substantial burden" when "the solution to a majority of Plaintiff's myriad constraints appears to lie within Plaintiff's control"). If a church is denied a specific land use permit, for instance, the church may be able to find another suitable site. *See San Jose Christian College*, 360 F.3d at 1035. If alternative locations or opportunities for comparable religious exercise are available, the regulation may only inconvenience the adherent, and may not constitute a substantial burden. *See Midrash Sephardi*, 366 F.3d at 1227.[10]

In *Adkins*, the Fifth Circuit cited *Lyng v. N.W. Indian Cemetery Protective Assoc.*, 485 U.S. 439 (1988), one of this Court's land-use cases, to support its assertion that "merely preventing the adherent from either enjoying some benefit that is not generally available or acting in a way that is not generally allowed" is not a "substantial burden" upon an adherent. *Adkins*, 393 F.3d at 570. Prisoners, however, frequently rely wholly on prison management to provide opportunities for religious exercise. *See Cutter v. Wilkinson*,

---

[10] In the same vein, if the burdened exercise is one of many means to the same end, the court may not find any single burden substantial. *See Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Cir. 2001) (finding that a restriction on selling t-shirts on the national mall was not a substantial burden on plaintiff's belief in the need to spread the gospel) (applying RFRA).

544 U.S. 709 (2005) ("RLUIPA thus protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion"). If the government constrains a prisoner's religious exercise, therefore, the prisoner often lacks the power – unlike those outside the prison walls – to seek alternative opportunities to participate in comparable forms of worship. In a prison setting, then, it is more likely that any restriction on religious practice will create a substantial burden on that practice. *See id.* at 720-21.

The Fifth Circuit panel did not take Baranowski's limited freedoms into account in deciding his appeal. Although the panel recognized that no rabbi or approved religious volunteer was available, the Court did not consider whether Baranowski had a reasonable opportunity to recruit sufficient free-world volunteers to satisfy the prison's group-worship regulation – especially considering the Sabbath travel restrictions for certain Jewish volunteers. *See Baranowski*, 486 F.3d at 124-25; *cf. Agrawal*, 2004 U.S. Dist. LEXIS 16997, at *21-23 (finding a prison's requirement that he receive documentation from a clergy member to receive a non-traditional diet a substantial burden because, among other reasons, defendants did not prove that a clergy member was available, willing, and able to confirm the adherent's religious requirements). The Court did not consider whether Baranowski could effectively recruit additional free-world volunteers for each Sabbath from behind prison walls, and thus could not determine whether the prison regulation effectively forces him to refrain from Sabbath group worship, resulting in a complete abandonment of that religious exercise.

Indeed, under the *Adkins* standard, courts need not determine whether or not an adherent was forced to refrain from religious exercise due to a lack of alternative opportunities for comparable forms of worship. Under that standard, burdens that force an adherent to refrain from important religious exercise could still be classified as insubstantial if the religious exercise is not "generally allowed." This defies common sense, along with multiple courts' interpretations. *See Mack v. O'Leary*, 80 F.3d 1175, 1180 (7th Cir. 1996) (interpreting RFRA); *Werner v. McCotter*, 49 F.3d 1476, 1480 (10th Cir. 1995) (interpreting RFRA); *Charles*, 220 F. Supp. 2d at 946; *Farrow*, 2004 WL 224602, at *9; *Agrawal*, 2004 U.S. Dist. LEXIS 16997, at *21-23. In fact, some courts have recognized that, in a prison setting, restrictions that force adherents to refrain from group worship substantially burden religious exercise. *Marria*, 2003 U.S. Dist. LEXIS 13329, at *48-51; *Coronel v. Paul*, 316 F. Supp. 2d 868, 881-82 (D. Ariz. 2004), *reversed on other grounds by* 2007 U.S. App. LEXIS 6928 (9th Cir. Mar. 12, 2007). Because the Fifth Circuit standard does not consider the degree of control the prisoner has over alternative means of exercise, the Court should grant certiorari.

CONCLUSION

Prisoners have filed a significant number of claims under RLUIPA since its inception. *See* Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 Harv. J.L. & Pub. Pol'y 501, 570 (2005) (recognizing sixty discrete prisoner cases that have ruled on either the merits of the claim or the constitutionality of RLUIPA). Prisoners will

continue to use RLUIPA to vindicate their statutory religious rights. Because the Fifth Circuit's application of RLUIPA differs from its sister circuits, a prisoner's right to religious exercise depends on where he is incarcerated – an anomalous result, considering that Congress sought to enact a single nationwide standard through Federal legislation. This Court should grant certiorari in this case to harmonize the application of the "substantial burden" standard. *Cf. id.* at 516 n.65 (collecting cases with inconsistent "substantial burden" standards).

Respectfully submitted,

JOEL L. THOLLANDER
Counsel of Record
MCKOOL SMITH, P.C.
300 W. 6th Street, Suite 1700
Austin, Texas 78701
(512) 692-8700
(512) 692-8744 (FAX)

ANTHONY GARZA
MCKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, Texas 75201
(214) 978-4000
(214) 978-4044 (FAX)

Counsel for Petitioner

APPENDIX A

THOMAS H BARANOWSKI, Plaintiff-Appellant

v.

CHAPLAIN LARRY HART; LAWRENCE N HODGES, Huntsville Unit Warden; TED SANDERS, Rabbi TDCJ Chaplaincy Department; BILL PIERCE, TDCJ Chaplaincy Department; DOUGLAS DRETKE, TDCJ-ID, Director
Defendants-Appellees

No. 05-20646

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

486 F.3d 112; 2007 U.S. App. LEXIS 11633

May 4, 2007, Filed

COUNSEL: THOMAS H. BARANOWSKI, Plaintiff-Appellant, Pro se, Texas Department of Criminal Justice, Huntsville, TX.

LARRY HART, LAWRENCE N HODGES, Huntsville Unit Warden, TED SANDERS, BILL PIERCE, TDCJ Chaplaincy Department, DOUG DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONS INSTITUTIONS DIVISION, Defendants-Appellee: Marjolyn Carol Gardner, Assistant Attorney General, Office of the Attorney General, Law Enforcement Defense Div, Austin, TX.

JUDGES: Before HIGGINBOTHAM, WIENER, and PRADO, Circuit Judges.

OPINION BY: PRADO

OPINION

PRADO, Circuit Judge:

In this appeal, a Texas prisoner contends that the defendants-appellees violated his rights under the First Amendment, the Fourteenth Amendment, and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 *et seq.*, by failing to provide weekly Sabbath and other holy day services, by failing to allow Jewish prisoners to use the chapel for their religious services, and by failing to provide him with a kosher diet. He also alleges that he was improperly denied appointment of counsel, an evidentiary hearing, and his right to a jury trial. For the reasons that follow, we AFFIRM the district court's order granting summary judgment in favor of the defendants-appellees.

I. FACTUAL AND PROCEDURAL BACKGROUND

Thomas H. Baranowski ("Baranowski"), an inmate incarcerated in the Huntsville Unit of the Texas Department of Criminal Justice ("TDCJ"), proceeding pro se and *in forma pauperis,* filed a civil rights complaint in federal district court, pursuant to 42 U.S.C. § 1983, against employees and officials of the TDCJ: Defendants-Appellees Larry Hart ("Hart"), Huntsville Unit Chaplain; Lawrence Hodges, Huntsville Unit Warden; Ted Sanders, Rabbi for the TDCJ; Bill Pierce ("Pierce"), Director of the TDCJ Chaplaincy Department; and Douglas Dretke, former Director of the TDCJ (collectively, "Defendants").[1]

[1] Baranowski subsequently moved to dismiss Rabbi Ted Sanders as a defendant, and the motion was granted.

Baranowski's complaint sought declaratory and injunctive relief for alleged violations of the First Amendment, the Fourteenth Amendment, and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1 *et seq.*[2]

Baranowski, a member of the Jewish faith, alleged that Defendants "denied Jewish prisoners access to Sabbath services while depriving them of worship and fellowship and holyday [sic] services, meals and observances and finally discriminating against Jewish prisoners and favoring other faith groups in regard to chapel services, worship and rehabilitation." More specifically, Baranowski asserted that Defendants had deprived him and other Jewish inmates of access to Friday Sabbath services in September and October 2003 and High Holy Day services, had deprived him and other Jewish inmates of access to the Huntsville Unit chapel for their religious observances, and had failed to provide kosher diets conforming with the dietary laws of Judaism. Baranowski also claimed that prisoners of other religious faiths were treated more favorably than Jewish prisoners, citing limited religious services and chapel access for Jewish prisoners.[3]

---

[2] Baranowski's complaint also alleged violations of the Fifth and Ninth Amendments, the Americans with Disability Act, the Rehabilitation Act, and the Texas Religious Freedom Act, as well as a § 1983 retaliation claim. Baranowski has not challenged the district court's ruling on these issues, and we decline to consider these claims any further on appeal. *See Yohey v. Collins*, 985 F.2d 222, 224-25 (5th Cir. 1993) (stating that pro se litigants must brief arguments to preserve them for appellate review).

[3] Although Baranowski listed other inmates as additional plaintiffs, the district court concluded that Baranowski was the only plaintiff in this lawsuit. Baranowski has not challenged this ruling on appeal.

Defendants moved for summary judgment, filing copies of various prison policies and sworn affidavits in support. In his affidavit, Pierce, the Director of the TDCJ Chaplaincy Department, testified that "TDCJ allows all offenders to worship according to their faith preference in their cell[s] using allowed items such as sacred texts, devotional items, and materials." According to Pierce, TDCJ policy is to allow inmates as much freedom and opportunity as possible for pursuing their individual beliefs and practices, consistent with agency security, safety, order, and rehabilitation concerns. Pierce explained that religious services are provided based on demand, need, and resources. He further testified that "[c]haplaincy services are nondiscriminatory in the treatment of offenders' religious beliefs, but TDCJ policy attempts to take space, time, and staffing restraints into consideration."

Pierce stated that of the 145,000 offenders currently confined in TDCJ, only 900 are self described as Jewish. Of those, only 70 to 75 are "recognized" as actually practicing their faith, with 90 in the conversion process. According to Pierce, these numbers are very small when compared to the number of observant Protestants, Catholics, and Muslims.

Pierce also stated that although Jewish programs and activities are not available at every unit, they are available at the Huntsville Unit, which is one of seven Jewish "host" units within the TDCJ. He explained that "[r]abbis, not offenders, lead Jewish services to ensure that religious practices reflect Jewish doctrines. There is no other way for TDCJ to accommodate the demand for Jewish congregational services from practicing Jews." According to Pierce, "[b]ecause of the small number of inmates who actually practice Judaism and attend Jewish services, as

well as the limited availability of rabbis in certain geographical areas of the state, TDCJ is unable to hold Jewish services at every Jewish host unit on a weekly basis." Pierce testified that services are held at least monthly at each of the Jewish host units. Pierce explained that in addition to monthly services, however, the TDCJ recognizes twenty-one Jewish holy days (compared with two for Christians), and that time off is permitted for eight of those days.

Pierce also testified about the numerous requests that TDCJ receives from inmates for special diets for religious reasons. He explained that:

> While TDCJ tries to accommodate inmates' religious needs, it must take into account the orderly administration of the prison and its resources while not giving any single inmate or group of inmates preferential treatment. If TDCJ were to grant one inmate's request for a special diet or religious item, numerous inmates would request similar special privileges.
>
> . . . .
>
> TDCJ has reviewed requests for kosher diets and has studied the impact of complying with such a request, by either providing a separate kosher kitchen or by bringing in kosher food from the outside. TDCJ has determined that it would be far too costly and would far exceed the allotted budget to provide kosher food. No TDCJ unit is currently set up to accommodate a kosher diet, which requires food preparation under certain ritual requirements and without contact with non-kosher food. Given the small number of offenders identifying themselves as Jewish (and the small number recognized as practicing Jews

> by TDCJ Jewish authorities), and their various classification and programmatic needs, at least several units would have to remodel their kitchens and substantially alter food preparation procedures. Kosher meals also are very costly. The state of Florida has reported that it costs them between 12 and 15 dollars per day per offender to provide kosher meals compared with $2.46 per day the State of Texas pays for offender meals. Providing kosher meals for a very small subset of offenders would place a tremendous burden on the ability of TDCJ to provide a nutritionally appropriate meal to all other offenders because of the budgetary impact alone. Furthermore, due to budget deficits, the Texas Legislature at the last legislative session specifically targeted inmate food services for a mandatory reduction in the biennial of more than $6 million. Providing kosher meals would put a great strain on an already strained system, and would raise resentment among other inmates because payments for kosher meals would of necessity come out of the general food budget for all inmates. The problem would be compounded because inmates of other faiths would seek similar privileges.

Pierce testified that as an alternative to kosher meals, "all inmates may choose to be served a pork-free diet or a vegetarian diet." In addition, Jewish inmates may receive kosher items from the Aleph Institute, a not-for-profit organization, at no cost to the state of Texas.

Prison policy 3.01, which Defendants included with their summary judgment motion, elaborates on TDCJ's diet policy and substantiates Pierce's testimony. It declares that the "[g]eneral population may select a regular tray, a meat-free tray, or a pork-free tray from the food service

line. Any type of meal may be selected from meal to meal." It goes on to state:

> [t]o assure minimal nutritional needs are met, menu item replacements using one of three options shall be made when meat or pork is not served:
>
> - Option 1 – 1 oz. of sliced cheese, additional 4 oz. of beans and additional serving of bread.
> - Option 2 – 1 hard-boiled egg and 1 peanut butter and jelly sandwich.
> - Option 3 – 1 peanut butter and jelly sandwich and additional 4 oz. serving of beans.

Finally, the policy adds that while chaplains may assist offenders in understanding what the food preferences or restrictions are for various religions, it is the offender's responsibility to follow dietary preferences or restrictions based on his designated faith preference.

Defendants also introduced affidavit testimony of Hart, a chaplain at the Huntsville Unit, in support of their summary judgment motion. Hart testified that because rabbis or approved outside volunteers lead Jewish services, "[s]cheduled events may be delayed or canceled when qualified spiritual leaders are not available." The Huntsville Unit has a contract rabbi who works with Hart to schedule Jewish services, order religious items, and authorize time off for Jewish holy days. Hart explained that Jewish services in September and October 2003 were canceled, as complained of by Baranowski, because a rabbi or qualified volunteer was not available.

Hart also testified about the use of the Huntsville Unit chapel. He explained that Friday night Sabbath services for the twelve Jewish inmates who routinely attend are held in the Education Department and not the chapel because the chapel is made available to the New Birth Bible Program, a group consisting of approximately 175 participants. Hart pointed out that the chapel is open to all offenders from 10:30 a.m. until 11:30 a.m. on Monday through Thursday for religious study.

The district court granted summary judgment and entered a judgment dismissing the complaint with prejudice. The district court held that the summary judgment evidence showed that restrictions on Baranowski's religious observances were justified by valid penological interests related to prison staffing, space limitations, and the financial burden of accommodating Baranowski's requests. The district court concluded that Baranowski had not shown that Defendants purposefully discriminated against him or that similarly situated individuals were treated differently. The district court also held that Baranowski had failed to present prima facie evidence that Defendants had "substantially burdened" his religious practices under RLUIPA. The district court concluded that even assuming Baranowski were to establish a substantial burden on his religious observance, "defendants' financial, safety, space, and security concerns for the prison, its inmates, and employees, and the goal of maintaining a neutral policy of religious accommodation for all recognized religious faiths, are compelling governmental interests."

Baranowski now appeals. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

II. STANDARD OF REVIEW

We review the district court's grant of summary judgment de novo. *Freeman v. Tex. Dep't of Criminal Justice,* 369 F.3d 854, 859 (5th Cir. 2004). Summary judgment is warranted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). If the movant satisfies its initial burden of demonstrating the absence of a material fact issue, then "'the non-movant must identify specific evidence in the summary judgment record demonstrating that there is a material fact issue concerning the essential elements of its case for which it will bear the burden of proof at trial.'" *Douglass v. United Servs. Auto. Ass'n,* 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc) (quoting *Forsyth v. Barr,* 19 F.3d 1527, 1533 (5th Cir. 1994) (citations omitted)). "However, the nonmovant cannot satisfy this burden with conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence." *Freeman,* 369 F.3d at 860.

III. DISCUSSION

Baranowski's appeal raises three challenges to the district court's summary judgment ruling: the dismissal of his free exercise claim; the dismissal of his equal protection claim; and the dismissal of his RLUIPA claim.[4]

---

[4] Two additional issues raised by Baranowski can be disposed of here. First, Baranowski attempts to appeal the district court's denials of his motions for temporary restraining orders, but it is well established in this circuit that the denial of an application for a temporary restraining order is not appealable. *See House the Homeless, Inc. v.*

(Continued on following page)

Baranowski also contends that he was wrongly denied appointment of counsel, an evidentiary hearing, and the right to his day in court. We address each issue in turn.

A. Free Exercise Claim

Baranowski argues that Defendants have impeded his free exercise of religion under the First Amendment by denying him access to Jewish Sabbath and other holy day services, by depriving him of kosher meals required by his faith, and by denying him access to the Huntsville Unit chapel for religious observances. Defendants counter that valid penological objectives, including security, staff and space limitations, and financial burdens, justify TDCJ's policies, and that Baranowski has alternative means of practicing his religion.

This court reviews prison policies that impinge on fundamental constitutional rights under the deferential standard set forth in *Turner v. Safley,* 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). Under *Turner,* a prison regulation that impinges on an inmate's constitutional rights is valid if it is reasonably related to legitimate penological interests. *Id.* at 89. *Turner* requires the court to consider four factors: (1) whether a valid and rational connection exists between the prison regulation and the legitimate governmental interest put forward to justify it;

Widnall, 94 F.3d 176, 180 n.8 (5th Cir. 1996). Second, Baranowski contends in his reply brief that he has raised a claim of "denial of due process rights to practice his Jewish faith." However, he has done nothing more than mention this as an issue, without any reference to it in the argument section of his initial or reply brief or any citation of legal authority. We decline to consider it further on appeal. *See Yohey,* 985 F.2d at 224-25.

(2) whether there are alternative means of exercising the right that remain open to prison inmates; (3) the impact of the accommodation on prison guards, other inmates, and the allocation of prison resources generally; and (4) whether there are "ready alternatives" to the regulation in question. *Id.* at 89-90. "A court 'must determine whether the government objective underlying the regulation at issue is legitimate and neutral, and that the regulations are rationally related to that objective.'" *Freeman,* 369 F.3d at 860 (quoting *Thornburgh v. Abbott,* 490 U.S. 401, 414-15, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989)); *see also Scott v. Miss. Dep't of Corr.,* 961 F.2d 77, 80-81 (5th Cir. 1992) (explaining that a court need not "weigh evenly, or even consider, each of these factors," as rationality is the controlling standard).

Turning to the *Turner* factors, we hold that the TDCJ policies on the availability of religious services and use of the chapel pass constitutional muster. In so holding, we are guided by this circuit's recent decision in *Adkins v. Kaspar,* 393 F.3d 559 (5th Cir. 2004).

In *Adkins,* the plaintiff argued that his free exercise rights were denied when he and other members of the Yahweh Evangelical Assembly ("YEA") were not permitted to assemble on every Sabbath day and on particular holy days because no volunteer deemed acceptable by the defendants was available to supervise the meetings. 393 F.3d at 564. Applying the *Turner* factors, the court in *Adkins* first recognized that this court had recently held that the TDCJ's religious accommodationpolicy is rationally related to legitimate government objectives. *Id.* (citing *Freeman,* 369 F.3d at 861); *see also Freeman,* 369 F.3d at 861 (holding that TDCJ's religious accommodation policy "is neutral – it 'operate[s] . . . without regard to the

content of the expression'") (quoting *Turner,* 482 U.S. at 90). The court then looked to the second *Turner* factor, recognizing that "'[t]he pertinent question is not whether the inmates have been denied specific religious accommodations, but whether, more broadly, the prison affords the inmates opportunities to exercise their faith.'" *Adkins,* 393 F.3d at 564 (quoting *Freeman,* 369 F.3d at 861). The court concluded that YEA members had alternative means of exercising their religion, given their access to religious materials and their ability to hold and attend live services when a spiritual leader was available. *Id.* Applying the third *Turner* factor, the court reasoned:

> The 20 to 25 active members of YEA constitute less than one percent of the large inmate population at Coffield. Requiring the defendants to accommodate every religious holiday and requirement of the YEA, regardless of the availability of volunteers, space, or time, could "spawn a cottage industry of litigation and could have a negative impact on prison staff, inmates and prison resources." Moreover, if Adkins were accommodated and other similarly situated small religious groups were not, the YEA could appear to be favored over the others, a perception that could have a negative effect on prison morale and discipline.

Id. at 565 (quoting *Freeman,* 369 F.3d at 862). Finally, under the fourth *Turner* prong, the court determined that "no obvious, easy alternatives would accommodate both Adkins and the TDCJ's administrative needs." *Id.* (internal quotation marks and citation omitted). The court concluded that in light of the *Turner* factors, the dismissal of the plaintiff's free exercise claim was proper.

We reach the same result in the instant case pursuant to *Turner* on facts that are not materially different from *Adkins*. The record demonstrates that the prison policies at issue here are logically connected to legitimate penological concerns of security, staff and space limitations, and that there are no obvious or easy alternatives. Baranowski's main complaint is that the prison could accommodate the need for weekly Jewish services if inmates were permitted to lead the services without the assistance of a rabbi or approved outside volunteer. However, *Adkins* rejected this argument, and we do so again here. The summary judgment evidence shows that despite being denied weekly Sabbath services and other holy day services when a rabbi or approved volunteer is not present, Baranowski retains the ability to participate in alternative means of exercising his religious beliefs, including the ability to worship in his cell using religious materials and the ability to access the chapel and lockers containing religious materials on certain days and times.[5] *See O'Lone v. Estate of Shabazz,* 482 U.S. 342, 351-52, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987) (upholding a regulation that prevented Muslim prisoners from attending Friday Jumu'ah services, and recognizing that although there were "no alternative means of attending Jumu'ah [since] respondents' religious beliefs insist that it occur at a particular time," inmates were "not deprived of all forms of religious exercise, but instead freely observe a number of their religious obligations"); *see also Turner,* 482 U.S. at 90 ("Where other avenues remain available for the

[5] Although Baranowski contends that some inmates could not take advantage of the weekday religious study in the chapel because of work assignments, he does not claim that he was not able to do so himself.

exercise of asserted rights, courts should be particularly conscious of the measure of judicial deference owed to corrections officials in gauging the validity of the regulation.") (internal quotation marks, citations, and alterations omitted). Finally, the Jewish population at the TDCJ constitutes less than one percent of the total inmate population. If this court were to require the TDCJ to accommodate every religious holiday and requirement of the Jewish faith, regardless of the availability of qualified volunteers and adequate space and security, we "would spawn a cottage industry of litigation and could have a negative impact on prison staff, inmates, and prison resources." *Freeman,* 369 F.3d at 862. We decline to yield to Baranowski's demands.

We reach the same result on TDCJ's policy of not providing kosher meals. This circuit has already ruled that prisons need not respond to particularized religious dietary requests to comply with the First Amendment. *See Kahey v. Jones,* 836 F.2d 948 (5th Cir. 1988); *Udey v. Kastner,* 805 F.2d 1218 (5th Cir. 1986).

In *Kahey,* we held that the prison was not required to accommodate a Muslim inmate's request for a kosher diet, with particularized requirements regarding the content and preparation of food. 836 F.2d at 950-51. In applying the *Turner* factors, the court concluded that there was a logical connection between the prison policy on inmate diet and the "legitimate governmental interest in running a simplified prison food service rather than a full-scale restaurant." *Id.* at 950. The court also determined that the inmate's practice of Islam was "not entirely circumscribed in the prison, and that this factor, as the [Supreme Court] found in *O'Lone,* compensates for the prison's failure to satisfy her dietary demand." *Id.* at 951. The court concluded that the

impact of granting the inmate's request would be expensive, diverting resources from other penological goals, and could result in the perception that certain inmates were favored over others, which would have an adverse impact on prison morale. *Id.* Finally, the court found that there were simply no ready alternatives to satisfy the inmate's dietary requirements at a *de minimis* cost to the prison. *Id.*; *see also Turner,* 482 U.S. at 91.

Udey, decided before the Supreme Court's decision in *Turner,* also held that the First Amendment did not require a prison to provide an inmate with a diet consistent with his religious beliefs. 805 F.2d at 1221. The court reasoned that meeting the inmate's religious and dietary requirements would place undue costs and administrative burdens on the prison system because of the likelihood of proliferation of such requests and the concomitant need to meet multiple distinct dietary requests. *Id.*

For the reasons stated by the courts in *Kahey* and *Udey,* we conclude that denial of a kosher diet does not violate Baranowski's free exercise rights. Consequently, we affirm the district court's dismissal of Baranowski's First Amendment claim.

B. Equal Protection Claim

Baranowski next alleges that Defendants violated his equal protection rights by favoring other religions over Judaism. Specifically, he contends Christian and Muslim services are conducted more frequently than Jewish services, and that other groups have greater access to the chapel. Defendants respond that Baranowski has provided no summary judgment evidence of purposeful discrimination regarding any of his allegations.

To succeed on his equal protection claim, Baranowski "'must prove purposeful discrimination resulting in a discriminatory effect among persons similarly situated.'" *Adkins,* 393 F.3d at 566 (quoting *Muhammad v. Lynaugh,* 966 F.2d 901, 903 (5th Cir. 1992)). "However, the Fourteenth Amendment does not demand 'that every religious sect or group within a prison – however few in numbers – must have identical facilities or personnel.'" *Freeman,* 369 F.3d at 862-63 (quoting *Cruz v. Beto,* 405 U.S. 319, 322 n.2, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972)). Rather, prison officials must afford prisoners "reasonable opportunities . . . to exercise the religious freedom guaranteed by the First and Fourteenth Amendment[s]." *Cruz,* 405 U.S. at 322 n.2. "*Turner* applies with corresponding force to equal protection claims." *Freeman,* 369 F.3d at 863.

Baranowski's equal protection claim must fail. He has offered no competent summary judgment evidence that similarly situated faiths are afforded superior treatment, or that TDCJ's policies are the product of purposeful discrimination.[6] Although Baranowski claims that other religious groups have greater access to the chapel, it is recognized that "[a] special chapel or place of worship need not be provided for every faith regardless of size; nor must a chaplain, priest, or minister be provided without regard to the extent of the demand." *Cruz,* 405 U.S. at 322 n.2. It is therefore not constitutionally impermissible for Defendants to consider the demand and need of the group requesting the chapel, along with space and staffing

[6] To the extent Baranowski is raising an equal protection claim regarding the denial of kosher meals, the uncontroverted summary judgment evidence shows that the TDCJ does not serve kosher meals to any inmate.

limitations, when deciding where religious groups will conduct their services. *See id.* (noting that the Constitution does not demand that every religious group, regardless of size, have identical facilities).

In sum, Baranowski has failed to provide anything more than bald and unsubstantiated allegations that Defendants purposefully discriminated against him. This is not enough to succeed on an equal protection claim. *See Adkins,* 393 F.3d at 566. We therefore affirm the district court's dismissal of this claim.

C. RLUIPA Claim

Baranowski next argues that his inability to observe Sabbath and other holy day services and his inability to consume kosher meals substantially burden his ability to practice Judaism, in violation of RLUIPA. As a "Torah-observant Jew," Baranowski claims that he is compelled to observe the Sabbath and other holy days and to consume kosher food. He contends that the substantial burdens imposed by Defendants pressure him to modify his behavior and to violate his sincerely held religious beliefs. Defendants counter that Baranowski has failed to establish that his religious practices are substantially burdened. In the alternative, Defendants argue that their policies are the least restrictive means of furthering their compelling interests of security, safety, space, personnel, and financial concerns for the prison and its inmates and employees.

RLUIPA mandates that

> [n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the

> burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person –
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a). "RLUIPA thus protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." *Cutter v. Wilkinson,* 544 U.S. 709, 721, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005).

The threshold inquiry under RLUIPA is whether the challenged governmental action substantially burdens the exercise of religion. The burden of proving the existence of a substantial interference with a religious exercise rests on the religious adherent. 42 U.S.C. § 2000cc-2(b). If such a substantial burden is proven, it is then up to the government to demonstrate that the compelling interest test is satisfied. *See id.*

RLUIPA defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5(7)(A).[7] "'[T]he "exercise of religion" often involves not only belief and

---

[7] "Although RLUIPA bars inquiry into whether a particular belief or practice is 'central' to a prisoner's religion . . . the Act does not preclude inquiry into the sincerity of a prisoner's professed religiosity." *Cutter,* 544 U.S. at 725 n.13. Here, however, Defendants have not argued that Baranowski is not sincere in his beliefs, and the record gives us no reason to question the sincerity of his religious beliefs.

profession but the performance of . . . physical acts [such as] assembling with others for a worship service [or] participating in sacramental use of bread and wine. . . .'" *Cutter,* 544 U.S. at 720 (quoting *Employment Div., Dep't of Human Res. of Ore. v. Smith,* 494 U.S. 872, 877, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)). There is no question that the activities alleged to be burdened in this case – Jewish Sabbath and holy day services and keeping kosher – qualify as "religious exercises" for the practice of Judaism under RLUIPA's generous definition. *See Adkins,* 393 F.3d at 567-68 (stating that Sabbath and holy day gatherings "easily qualify as 'religious exercise' "); *Guzzi v. Thompson,* 470 F. Supp. 2d 17, 25 (D. Mass. 2007) (stating that the practice of "keeping kosher" constitutes a religious exercise for the Jewish faith).

In *Adkins,* we considered the meaning of "substantial burden," which is not defined by the statute. We held that "for purposes of applying the RLUIPA in this circuit, a government action or regulation creates a 'substantial burden' on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs." 393 F.3d at 569-70. The court cautioned, however, that "our test requires a case-by-case, fact-specific inquiry to determine whether the government action or regulation in question imposes a significant burden on an adherent's religious exercise. . . ." *Id.* at 571.

We first consider whether Baranowski's religious exercise was substantially burdened when he was prevented from congregating with other Jewish inmates on many Sabbath and Jewish holy days. The uncontroverted summary judgment evidence shows that on the days Baranowski claims that services were not provided, no

rabbi or approved religious volunteer was available to lead the services. This court considered a similar claim under RLUIPA in *Adkins;* the plaintiff in that case was prevented from gathering with other YEA members for various religious observances. We explained that the plaintiff and other YEA members were not prevented from congregating by prison policy but by the dearth of clergy and authorized volunteers. *Id.* We held that the requirement of an outside volunteer did not place a substantial burden on the plaintiff's religious exercise under RLUIPA. *Id.* In light of this court's decision in *Adkins* and the summary judgment evidence before us, we are convinced that the acts of Defendants regarding religious services have not placed a substantial burden on Baranowski's free exercise of his Jewish faith, within the contemplation of RLUIPA. *See id.*

We next consider whether the failure of Defendants to provide Baranowski with a kosher diet constitutes a substantial burden on his religious exercise. Baranowski argues that his inability to consume kosher food has pressured him to modify his behavior and to violate his sincerely held religious beliefs. *Cf. Ran-Dav's County Kosher, Inc. v. New Jersey,* 129 N.J. 141, 608 A.2d 1353, 1355-56 (N.J. 1992) (describing Jewish dietary laws and their significance to Judaism). Given the strong significance of keeping kosher in the Jewish faith, the TDCJ's policy of not providing kosher food may be deemed to work a substantial burden upon Baranowski's practice of his faith.

Turning to the compelling interest test, Defendants must show that their dietary policy of not providing kosher meals is the least restrictive means of furthering a compelling governmental interest. As the Supreme Court recently explained, "'[c]ontext matters' in the application of that

standard." *Cutter,* 544 U.S. at 723 (quoting *Grutter v. Bollinger,* 539 U.S. 306, 327, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003)). Courts should apply the "compelling governmental interest" standard with "'due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.'" *Id.* (quoting S. REP. NO. 103-111, at 10 (1993)) RLUIPA, in other words, is not meant to elevate accommodation of religious observances over the institutional need to maintain good order, security, and discipline or to control costs. *See Lovelace v. Lee,* 472 F.3d 174, 190 (4th Cir. 2006).

The uncontroverted summary judgment evidence submitted by Defendants establishes that TDCJ's budget is not adequate to cover the increased expense of either providing a separate kosher kitchen or bringing in kosher food from the outside; that TDCJ's ability to provide a nutritionally appropriate meal to other offenders would be jeopardized (since the payments for kosher meals would come out of the general food budget for all inmates); that such a policy would breed resentment among other inmates; and that there would be an increased demand by other religious groups for similar diets.

Based on the record before us, we hold that this policy is related to maintaining good order and controlling costs and, as such, involves compelling governmental interests. *Cf. Andreola v. Wisconsin,* 211 Fed. Appx. 495 at 499, 2006 WL 3724633, at *3 (7th Cir. 2006) (unpublished) (finding no RLUIPA violation where the defendant did not provide kosher meals based on the compelling governmental interests of maintaining security and "abating the costs of a prisoner's keep"). Further, the administrative and

budgetary interests at stake cannot be achieved by any different or lesser means. *Cf. Cutter,* 544 U.S. at 726 ("Should inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition."). Accordingly, we conclude that the district court properly granted summary judgment on Baranowski's RLUIPA claim.

D. Other Claims

Lastly, Baranowski claims that the district court erred in denying his request for appointment of counsel and by not giving him an evidentiary hearing or his day in court. These claims are without merit.

Under 28 U.S.C. § 1915(e)(1), the court may appoint an attorney to represent a litigant in federal court, but there is no automatic right to appointment of counsel in a civil rights case. *See Castro Romero v. Becken,* 256 F.3d 349, 353-54 (5th Cir. 2001). "In evaluating whether the appointment of counsel is proper, the district court considers the type and complexity of the case, the litigant's ability to investigate and present the case, and the level of skill required to present the evidence." *Id.* at 354. We review the district court's denial of appointment of counsel for an abuse of discretion. *Id.*

The district court held that Baranowski did not have a right to court-appointed counsel because of his "demonstrated ability to litigate his case" and "the elementary nature of [the] issues" involved in the case. After reviewing the record, we conclude that the district court did not abuse its discretion.

We also conclude that Baranowski has failed to show how his claims would have been advanced by an evidentiary hearing. He argues that he has not been given a chance to present "real evidence to support his wholesome claims." Baranowski has not shown why a hearing is needed to bring forth such evidence or why he did not present this evidence in his opposition to Defendants' motion for summary judgment. Accordingly, we cannot hold that the district erred in not conducting an evidentiary hearing.

Finally, Baranowski's claim that he was denied a jury trial is frivolous. Federal Rule of Civil Procedure 56(c) requires the court to render summary judgment if the appropriate materials on file "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." As this court has explained, "[t]he function of the jury is to try the material facts; where no such facts are in dispute, there is no occasion for jury trial. Thus the right to trial by jury does not prevent a court from granting summary judgment." *Plaisance v. Phelps,* 845 F.2d 107, 108 (5th Cir. 1988). When the district court properly entered summary judgment dismissing Baranowski's claims, his demand for a jury trial became moot. *See id.*

IV. CONCLUSION

For the reasons stated above, we affirm the district court's grant of summary judgment.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THOMAS A. BARANOWSKI, TDCJ-CID # 378384	§	
Plaintiff,	§	CIVIL ACTION
v.	§	NO. H-03-3893
LARRY HART, *et al.*,	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Thomas A. Baranowski,[1] an inmate incarcerated in the Texas Department of Criminal Justice – Correctional Institutions Division (TDCJ) Huntsville Unit, proceeding *in forma pauperis* and *pro se,* filed a civil rights complaint under 42 U.S.C. § 1983 and 42 U.S.C. § 2000cc-1, *et seq.* (RLUIPA) against TDCJ Chaplain Larry Hart, Warden Lawrence Neill Hodges, Bill Pierce, Ted Sanders, and Douglas Dretke.

Pending before the Court are plaintiff's motions to dismiss Ted Sanders (Docket Entry No. 15), for an evidentiary hearing, and for appointment of counsel (Docket Entries No. 28 and 29). Respondents have filed a motion for summary judgment (Docket Entry No. 17), to which plaintiff has responded (Docket Entry No. 18). For the

[1] Baranowski named other inmates as additional plaintiffs in his lawsuit. (Docket Entry No. 6, Part D.) These individuals have not signed any pleadings, sought joinder, or intervened as plaintiffs, and no class action status has been granted by the Court. Accordingly, Baranowski is the only plaintiff in this lawsuit.

reasons set forth below, summary judgment will be **GRANTED** and this case dismissed.

I. Background and Claims

According to his form complaint (attached to Docket Entry No. 4) and first amended complaint (Docket Entry No. 6), plaintiff is an inmate practicing the Jewish faith. He claims that the defendants violated the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 (RLUIPA), and his First and Fourteenth Amendment rights of religious freedom, equal protection, and due process, by (1) not providing Friday evening services during September and October, 2003; (2) not providing Saturday morning services (followed by showers); (3) not providing services for the 2003 Jewish High Holy Days; (4) not providing a "break-the-fast" meal following the 2003 Yom Kippur day of fasting; (4) limiting access to religious tapes and books located in the prison chapel; (5) not providing kosher-prepared meals; and (6) holding Friday evening services in a classroom instead of the chapel.

Plaintiff seeks a declaratory judgment, a permanent injunction, changes in TDCJ policies regarding Jewish inmates (Docket Entry No. 4, Complaint), and unspecified damages (Docket Entry No. 6, Part F).

In their motion for summary judgment, defendants argue, *inter alia,* that plaintiff's claims are without merit and should be dismissed.

The Court first will address plaintiff's pending non-dispositive motions.

II. Plaintiff's Non-Dispositive Motions

A. Motion to Dismiss Ted Sanders

Plaintiff requests that Ted Sanders be dismissed as a defendant (Docket Entry No. 15). The motion is **GRANTED**, and Ted Sanders is dismissed from this lawsuit.

B. Motion for Leave and Motion for an Evidentiary Hearing

Plaintiff has filed a motion seeking leave to file a motion for an evidentiary hearing, and a motion for an evidentiary hearing. (Docket Entries No. 28, 29). Because the Court will grant summary judgment dismissing this lawsuit, the motions are **DENIED AS MOOT**.

C. Motion for Leave and Motion for Appointment of Counsel

Plaintiff has filed a motion seeking leave to file a (second) motion for appointment of counsel, and a (second) motion for appointment of counsel. (Docket Entries No. 28, 29). Because the Court will grant summary judgment dismissing this lawsuit, the motions are **DENIED AS MOOT**. Moreover, and as the Court stated in its order denying plaintiff's first request for counsel, there is no right to court-appointed counsel in a civil rights case, and appointment of counsel is not warranted in this lawsuit due to the elementary nature of its issues and plaintiff's demonstrated ability to litigate his case.

III. Summary Judgment Standards

In deciding a motion for summary judgment, the court must determine whether the pleadings, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). Once the movant presents a properly supported motion for summary judgment, the burden shifts to the nonmovant to show with significant probative evidence the existence of a genuine issue of material fact. *Hamilton v. Segue Software, Inc.*, 232 F.3d 473, 477 (5th Cir. 2000). All evidence must be construed in the light most favorable to the nonmoving party without weighing the evidence, assessing its probative value, or resolving any factual disputes. *Williams v. Time Warner Operation, Inc.*, 98 F.3d 179, 181 (5th Cir. 1996). However, the nonmovant cannot rely on conclusory allegations or unsubstantiated assertions to establish that there is a triable issue. *Wallace v. Texas Tech University*, 80 F.3d 1042, 1047 (5th Cir. 1996).

IV. First Amendment Claims

Plaintiff complains that defendants violated his right to religious freedom by (1) not providing Friday evening services during September and October, 2003; (2) not providing Saturday morning services (followed by showers); (3) not providing services for the 2003 Jewish High Holy Days; (4) not providing a "break-the-fast" meal following the 2003 Yom Kippur day of fasting; (4) limiting access to religious tapes and books located in the prison chapel; (5) not providing kosher-prepared meals; and (6) holding Friday evening services in a classroom instead of the chapel.

The Constitution requires that an inmate be given a reasonable opportunity to exercise the religious freedoms guaranteed by the First and Fourteenth Amendments. *Cruz v. Beto,* 405 U.S. 319, 322 (1972). An inmate retains his First Amendment right to the free exercise of his religion, subject to reasonable restrictions and limitations necessitated by penological goals. *Turner v. Safley,* 482 U.S. 78, 89-91 (1987); *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 349-50 (1987). Prison officials have a duty to accommodate an inmate's religious beliefs unless there is a legitimate penological interest which prevents such accommodation. *Eason v. Thaler,* 14 F.3d 8, 10 (5th Cir. 1994). If a prison regulation impinges on an inmate's first amendment rights, the regulation is valid only if it is reasonably related to a legitimate penological interest. *Turner,* 482 U.S. at 87. If the court is reviewing action taken by prison officials rather than a regulation, the same standard is applicable to determine whether the prison official's act is constitutionally permissible. *Jackson v. Cain,* 864 F.2d 1235, 1248 (5th Cir. 1989).

In determining whether a regulation or policy is a valid restriction reasonably related to a legitimate penological interest, the Court considers the following factors:

(1) whether there exists a valid, rational connection between a restriction and the governmental interest invoked to justify it;

(2) the availability of an alternative means to exercise the restricted right;

(3) the impact on guards, other inmates, and the allocation of prison resources that would result from accommodating the asserted right; and

(4) whether there are ready alternatives to the restriction.

Turner, 482 U.S. at 89-91; *Adkins v. Kaspar,* 393 F.3d 559, 564 (5th Cir. 2004). In support of summary judgment, defendants present the following affidavit testimony of Billy Pierce, Director of the TDCJ Chaplaincy Department:

> The Chaplaincy Department receives numerous requests from inmates for special consideration in terms of religious items, diets, services, and privileges. While TDCJ tries to accommodate inmates' religious needs, it must take into account the orderly administration of prison and its resources while not giving any single inmate or group of inmates preferential treatment. If TDCJ were to grant one inmate's request for a special diet or religious item, numerous inmates would request similar special privileges.
>
> There are approximately 145,000 offenders currently confined in TDCJ, and only about 900 classify themselves as Jewish. Not all of self-identified Jewish offenders actively practice their faith. There are approximately 70 to 75 offenders in TDCJ who are recognized as Jewish and approximately 90 more who are in the conversion process. These numbers are very small compared to the total number of offenders and to the numbers of Protestants, Catholics, and Muslims. . . . Limited resources and the low Jewish population preclude Jewish activities, classes, and programs at every unit. Instead, TDCJ has limited Jewish programs and classes to seven units designated as Jewish host units [including the Huntsville unit].
>
> * * *

The main obstacle to giving Jewish inmates all the Jewish activities and privileges that they desire are our scarce resources, limited availability of rabbis, and the very low demand.

* * *

Many inmates have requested special diets for religious reasons. TDCJ has reviewed requests for kosher diets and has studied the impact of complying with such a request, by either providing a separate kosher kitchen or by bringing in kosher food from the outside. TDCJ [h]as determined that it would be far too costly and would far exceed the allotted budget to provide kosher food. . . . The problem would be compounded because inmates of other faiths would seek similar privileges.

As an alternative to kosher meals, all inmates may choose to be served a pork-free diet or a vegetarian diet. TDCJ can afford to provide these diets and they are available to all inmates. I do not know of any other way to accommodate the demand for kosher foods given TDCJ's limited resources and the need to treat all offenders equally. In addition, Jewish inmates may receive Kosher items from the Aleph Institute in Florida.

Because of the small number of inmates who actually practice Judaism and attend Jewish services, as well as the limited availability of rabbis in certain geographical areas of the state, TDCJ is unable to hold Jewish services at every Jewish host unit on a weekly basis. Services are held at least monthly at each of the Jewish host units. Rabbis, not offenders, lead the Jewish services to ensure that religious practices reflect Jewish doctrines. There is no other way for TDCJ to

> accommodate the demand for Jewish congregational services from practicing Jews.
>
> TDCJ recognizes 21 Jewish holy days and permits offenders to take time off for eight of those days. TDCJ recognizes only two holy days for Christians.

(Docket Entry No. 17, Affidavit of Billy Pierce, pp. 2-4.) Plaintiff does not challenge this testimony with probative summary judgment evidence.

In further support of summary judgment, defendants present the following affidavit testimony of Larry Hart, a chaplain at the Huntsville unit employed by TDCJ since 1999:

> As a unit chaplain, I am not expected to function in the role of a faith-group official. I facilitate the ministry of representatives of various faith groups by managing the schedule of volunteer and contract chaplain services, ceremonies, and study groups.
>
> * * *
>
> TDCJ employs a lead contract rabbi to serve as the advisor to unit contract rabbis with decision-making authority with respect to the interpretation of Jewish law and customs. My unit's contract rabbi works with me to schedule Jewish services, order religious items, and authorize lay-ins (time off) for Jewish holy days.
>
> * * *
>
> Chaplains are responsible for scheduling regular opportunities for worship and other religious activities for offenders. All such meetings must, however, be governed by unit rules, regulations, and policies with regard to staff and volunteer

safety, security and orderly conditions of the unit, and offender conduct. Scheduled events may be delayed or canceled due to safety and security concerns.

Chaplains have no control over showers. This is strictly a security matter.

Ordinarily, worship events, religious activities and meetings of a religious nature are under the direct supervision of the unit's chaplain. The chaplain and warden may draw upon approved religious volunteers from the outside community to help facilitate and conduct scheduled religious activities. Rabbis or approved outside volunteers, not offenders, lead the Jewish services to ensure that religious practices reflect Jewish doctrines. Scheduled events may be delayed or canceled when qualified spiritual leaders are not available. *Jewish services were cancelled on September 5, 2003, September 12, 2003, October 3, 2004, and October 10, 2003 because a Rabbi or qualified volunteer was not available.*

Chaplaincy services are nondiscriminatory in the treatment of offenders' religious beliefs, but TDCJ policy attempts to take space, time, and staffing restraints into consideration. All services, religious and otherwise, are provided based on demand, need, and resources. For example, *the New Birth Bible Program with approximately 175 participants has met in the Huntsville Unit's chapel every Friday evening for the past 12 years. Only 12 individuals routinely attend Jewish services. As a result, Friday evening Jewish services are conducted in the Education Department.*

Although Jewish offenders are denied access to the chapel on Friday evenings, the chapel is open

> to all offenders from 10:30 a.m. until 11:30 a.m. every Monday, Tuesday, Wednesday, and Thursday for religious study. During these times offenders have access to lockers containing religious materials. Unfortunately, the chapel does not have any devices for replaying audio recordings.
>
> TDCJ recognizes 21 Jewish holy days and permits offenders to take time off (have lay-ins) for eight of those days. Purim is not designated as a holiday with time off (lay-in). I do not recall what happened with regard to Yom Kippur in 2003.

(Docket Entry No. 17, Affidavit of Larry Hart, pp. 2-3, emphasis added.) Plaintiff does not challenge this testimony with probative summary judgment evidence.

The Fifth Circuit has upheld the constitutionality of TDCJ's religious accommodation policy as rationally related to legitimate governmental interests. *Freeman v. Texas Department of Criminal Justice,* 369 F.3d 854 (5th Cir. 2004). The Fifth Circuit specifically held that prison staff and space limitations, as well as financial burdens, are valid penological interests. *Id.* at 861.

Based on the summary judgment record before it, the Court finds that TDCJ's accommodation policies and practices as set forth in these affidavits satisfy the *Turner* factors as to plaintiff's complaints. The pertinent question is not whether plaintiff has been denied specific religious accommodations, but whether, more broadly, the prison affords him opportunities to exercise his faith. *Freedman,* 369 F.3d at 861. Plaintiff does not assert that defendants denied or restricted his right to practice Judaism in his cell, or that he had no other alternative means of practicing his religious faith. Nor has he pointed to some obvious

regulatory alternative that fully accommodates his asserted rights while not imposing more than a *de minimis* cost to TDCJ's valid penological goal of maintaining prison security and discipline and remaining within its financial, personnel, and space restraints, and nondiscriminatory policy.

Plaintiff shows no violation of his free exercise rights, and defendants are entitled to summary judgment.

V. Fourteenth Amendment Claims

Plaintiff claims that defendants violated his due process and equal protection rights by (1) not providing Friday evening services during September and October, 2003; (2) not providing Saturday morning services (followed by showers); (3) not providing services for the 2003 Jewish High Holy Days; (4) not providing a "break-the-fast" meal following the 2003 Yom Kippur day of fasting; (4) limiting access to religious tapes and books located in the prison chapel; (5) not providing kosher-prepared meals; and (6) holding Friday evening services in a classroom instead of the chapel.

To maintain his claims for violation of due process and equal protection under the Fourteenth Amendment, plaintiff must allege and prove purposeful discrimination by defendants resulting in a discriminatory effect among persons similarly situated. *See Muhammad v. Lynaugh,* 966 F.2d 901, 903 (5th Cir. 1992). The Fourteenth Amendment does not demand that every religious sect or group within a prison, however few in numbers, must have identical prison facilities or personnel. *Freedman,* 369 F.3d at 862. Rather, prison administrators must provide inmates with

reasonable opportunities to exercise their religious freedoms. *Id.* at 863.

The fact that TDCJ's religious accommodation and related policies and regulations adversely impact plaintiff and his religious practices does not, by itself, establish a Fourteenth Amendment violation. "[D]isparate impact, alone, cannot suffice to state an Equal Protection violation; otherwise, *any* law could be challenged on Equal Protection grounds by whomever it has negatively impacted." *Rodriguez v. Johnson,* 110 F.3d 299, 306 (5th Cir. 1997) (emphasis in original). To maintain an equal protection claim, plaintiff must allege and prove that he received treatment different from that received by similarly situated individuals and that the unequal treatment stemmed from a discriminatory intent. *Taylor v. Johnson,* 257 F.3d 470, 472 (5th Cir. 2001).

Plaintiff complains that defendants did not provide him with kosher meals. He does not claim that defendants provided some inmates or religious groups with kosher meals while he himself was not. That "free world" religious support groups, with TDCJ approval, may have donated religious food to inmates of other religious groups does not establish an equal protection claim, and plaintiff does not allege that defendants turned away "free world" supporters who offered to provide him with kosher food. To state a claim under the Equal Protection Clause, a plaintiff must allege that similarly situated individuals have been treated differently. *Yates v. Stalder,* 217 F.3d 332, 334 (5th Cir. 2000). The inquiry focuses on whether the plaintiff is similarly situated to another group for purposes of the challenged governmental action. *Yates,* 217 F.3d at 334. The summary judgment evidence clearly shows that TDCJ does not provide kosher food to *any* inmate.

Discriminatory purpose in an equal protection context implies that the decision maker selected a particular course of action at least in part because of, and not simply in spite of, the adverse impact it would have on an identifiable group. *Johnson v. Rodriguez,* 110 F.3d 299, 306 (5th Cir. 1997). Plaintiff does not present any summary judgment evidence that TDCJ's refusal to serve kosher meals is intended to discriminate against inmates of one religious faith or another. Defendants' unchallenged evidence, on the other hand, demonstrates that TDCJ's refusal to serve kosher meals is based on financial and uniformity considerations.

This same reasoning holds against plaintiff's claims of failure to provide Friday services in September – October of 2003, failure to provide Saturday morning services with showers, limited access to TDCJ's collection of religious tapes and books, lack of a Yom Kippur "break-the-fast" meal on October 6, 2003, and the holding of Friday evening services in a classroom instead of the chapel. Plaintiff provides no summary judgment evidence of "purposeful discrimination resulting in a discriminatory effect among persons similarly situated." *Adkins,* 393 F.3d at 566. To the contrary, defendants' uncontroverted summary judgment evidence shown above sets forth neutral, non-discriminatory reasons for these events or situations. It is immaterial that defendants cannot recall what happened with regard to Yom Kippur in 2003, as plaintiff fails to present summary judgment evidence in support of his claim. His allegations of religious discrimination are conclusory and insufficient to defeat defendants' motion for summary judgment. Even assuming defendants did not provide plaintiff with a break-the-fast meal on October 6,

2003, this Court finds that such complaint fails to rise to the level of a constitutional issue.

Plaintiff's claims under the Fourteenth Amendment are without merit and will be dismissed.

VI. RLUIPA

The RLUIPA, codified at 42 U.S.C. § 2000cc, provides in pertinent part as follows:

> § 2000cc-1. Protection of religious exercise of institutionalized persons
>
> (a) General rule
>
> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person –
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

RLUIPA prohibits the State from imposing a "substantial burden" on the practice of religious faith. Under the RLUIPA, plaintiffs must produce *prima facie* evidence to support a violation, and they bear the burden of persuasion on whether the policies and regulations substantially burden their exercise of religion. 42 U.S.C. § 2000cc-2(b). A "religious exercise" for purposes of the RLUIPA includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C.

§ 2000cc-5(7)(A). The Supreme Court recently made it clear that under RLUIPA, accommodation of religious observances is not elevated over a prison's need to maintain order and safety. *Cutter v. Wilkinson,* ___ U.S. ___, 125 S. Ct. 2113, 2122 (2005).

The Fifth Circuit has determined that governmental action or regulation creates a "substantial burden" on a religious exercise if it "truly pressures the adherent to significantly modify his religious behavior and significantly violates his religious beliefs." *Adkins,* 393 F.3d at 570. A governmental action or regulation does not rise to the level of a substantial burden on religious freedom if it "merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed." *Id.*

In this case, plaintiff fails to present *prima facie* evidence that defendants have "substantially burdened" the practice of his religion. The uncontroverted summary judgment evidence shows that on the days plaintiff claims no Friday evening services were provided, no rabbi or approved religious volunteer was available to lead the services. Plaintiff does not submit any summary judgment evidence that defendants turned away an available rabbi or approved religious volunteer for those services. The uncontroverted evidence further shows that for the past twelve years, the chapel has been used on Friday evenings by a religious group of 175 members. That plaintiff's religious group of 12 or so members must use classroom facilities for Friday evening services does not create a substantial burden on plaintiff's religious practices, nor does the fact that Saturday morning Jewish services (with showers) are not provided in addition to Friday evening services. Plaintiff presents no probative summary judgment

evidence that defendants denied him services for the 2003 Jewish High Holy Days or a "break-the-fast" meal following the 2003 Yom Kippur day of fasting. Even assuming such events occurred, they were not "subtsantial burdens" on plaintiff's religious freedom. Moreover, it is clear from the unchallenged evidence that defendants provide access to religious books and materials located in the prison chapel, and that financial and space limitations, as well as considerations for fairness to all inmates, and religious groups, prevent defendants from providing plaintiff kosher meals and the other religion-based demands he seeks.

Even assuming plaintiff were to establish these instances as substantial burdens on the practice of his religion, defendants' financial, safety, space, and security concerns for the prison, its inmates, and employees, and the goal of maintaining a neutral policy of religious accommodation for all recognized religious faiths, are compelling governmental interests. Defendants have shown, and plaintiff has not shown to the contrary, that defendants' regulations and policies are the least restrictive means of furthering those compelling governmental interests. *See Adkins,* 393 F.3d at 567-68. As the Supreme Court noted in *Cutter,* "Should inmate requests for religious accommodations become excessive, impose unjustified burden on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition." 125 S. Ct. at 2125.

No RLUIPA violations have been shown, and defendants are entitled to summary judgment dismissing plaintiff's claims under that statute.

VII. Retaliation

To sustain a section 1983 retaliation claim, a plaintiff must establish (1) the existence of a specific constitutional right; (2) the defendants' intent to retaliate for the exercise of that right; (3) a retaliatory adverse act; and (4) causation. *Freedman,* 369 F.3d at 863. Plaintiff presents only unsupported conclusory allegations that defendants retaliated against him, and the claim is dismissed. *See Woods v. Smith,* 60 F.3d 1161, 1166 (5th Cir. 1995).

VIII. State Law and ADA claims

To the extent plaintiff claims that his rights under the Americans with Disabilities Act (ADA) and "Rehabilitation Act" have been violated, such claims are without support. Plaintiff neither alleges nor establishes that he has a disability as that term is meant under the ADA, and he fails to show that either the ADA or the "Rehabilitation Act" are applicable to the claims brought in this lawsuit.

The exact nature of his state law claims is unclear from plaintiff's pleadings. Regardless, as the Court has dismissed plaintiff's federal law claims, it declines to exercise supplemental jurisdiction over any state law claims he may have raised. 28 U.S.C. § 1367(c)(3).

IX. Conclusion and Order

The Court **ORDERS** as follows:

(1) Plaintiff's motion to dismiss Ted Sanders (Docket Entry No. 15) is **GRANTED**.

(2) Plaintiff's motions for an evidentiary hearing and appointment of counsel (Docket Entries No. 28, 29) are **DENIED**.

(3) Defendants' Motion for Summary Judgment (Docket Entry No. 17) is **GRANTED** and plaintiff's federal claims are **DISMISSED** with prejudice.

(4) Plaintiff's state law claims are **DISMISSED** without prejudice.

(5) All other pending motions and requests for relief are **DENIED**.

SIGNED on July 15, 2005

/s/ John D. Rainey
JOHN D. RAINEY
UNITED STATES
DISTRICT JUDGE